U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
*Office of Administrative Appeals* MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date FEB 24 2010

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an IT engineering and support services company. It seeks to employ the beneficiary permanently in the United States as a senior information engineer. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not demonstrated that the beneficiary had the qualifications stated on the Form ETA 750 as certified by the DOL. The director further determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).

The AAO will first consider whether the petitioner has established that it has the ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 23, 2003. The proffered wage as stated on the Form ETA 750 is $79,711.65 per year.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has submitted copies of the Forms W-2, Wage and Tax Statement, which it issued to the beneficiary for the years 2003 through 2006. The Forms W-2 list the wages paid to the beneficiary for the years 2003 through 2006 as follows:

| Year | Wages Paid |
|---|---|
| 2003 | $59,299.29 |
| 2004 | $62,683.88 |
| 2005 | $65,751.49 |
| 2006 | $71,728.46 |

The petitioner did not pay the beneficiary the full proffered wage from 2003 to 2006. Therefore, the petitioner must establish that it had the ability to pay the difference between the proffered wage and the wages actually paid, as represented in the table below.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

| Year | Difference between Proffered Wage and Wages Actually Paid |
|---|---|
| 2003 | $20,412.36 |
| 2004 | $17,027.77 |
| 2005 | $13,960.16 |
| 2006 | $7,983.19 |

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As noted above, pursuant to 8 C.F.R. § 204.5(g)(2), a petitioner can establish its ability to pay the proffered wage through audited financial statements. In the instant case, the petitioner has submitted audited financial statements for the years 2003, 2004 and 2005. The petitioner's audited financial statements demonstrate its net income for the years 2003 through 2005, as shown in the table below.

- In 2003 the petitioner's net income was $1,319,680.00
- In 2004, the petitioner's net income was $852,938.00
- In 2005, the petitioner's net income was $1,018,816.00

The petitioner had sufficient net income to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2003, 2004 and 2005. The petitioner did not submit a copy of its income tax return, audited financial statement or annual report for 2006. Therefore, the petitioner has not established that it had sufficient net income to pay the proffered wage in 2006.[2]

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. As noted, the petitioner did not submit copies of its income tax return, audited financial statement or annual report for 2006. Therefore, the petitioner has not established that it had sufficient net current assets to pay the proffered wage in 2006.

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[2] The record contains unaudited financial statements for 2006. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage in 2006 through an examination of wages paid to the beneficiary, net income or net current assets.

On appeal, counsel states that the petitioner conducts an annual audit of its financial records but that, as of the date that the appeal was filed, the audit for 2006 was not yet complete. However, on appeal, counsel has submitted an affidavit from [redacted] the petitioner's Chief Financial Officer. The affidavit states that the petitioner has approximately 200 employees and that, in 2006, the petitioner had annual earnings before interest, taxes, depreciation and amortization of $700,000. The affidavit concludes that the petitioner is able to pay the proffered wage. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage."

Given the record as a whole, this office will exercise its discretion and accept the letter from the petitioner's Chief Financial Officer. As noted above, the petitioner had sufficient net income to pay the proffered wage in 2003, 2004 and 2005. The petitioner's total revenues averaged more than $30,000,000.00 for the period from 2003 to 2005 and its labor expenses averaged more than $10,000,000.00 each year. The petitioner paid the beneficiary just $7,983.19 less than the proffered wage in 2006. Based on the totality of circumstances, including the affidavit from the petitioner's Chief Financial Officer, this office finds that the petitioner has established its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. This portion of the director's decision is withdrawn.

As noted above, the director also denied the instant petition based on the petitioner's failure to demonstrate that the beneficiary was qualified to perform the proffered position. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. at 159; *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, block 14 of the Form ETA 750 states that the position requires a master's degree, or equivalent combination of education, training and experience, in computer science of computer engineering. In addition, the position requires five years of experience in the job offered or in the

related occupation of computer programmer or software developer. Block 15 of the Form ETA 750 lists the following special requirements:

- Five years of software development experience;
- One year of experience with Visual Basic (6.0), ADO and Active X Components;
- One year of experience developing a Graphical Information System (GIS);
- One year of experience testing and debugging software programs; and
- Specialized knowledge of the Oracle database (8.x or higher).

Block 15 of the Form ETA 750 further notes that the required experience may be gained concurrently with the job offered or in a related occupation. Block 15 also states that the specialized knowledge may be gained through education and/or professional experience.

On the Form ETA 750B, signed by the beneficiary on July 21, 2003, the beneficiary indicated that she was awarded a Master of Science degree in computer science from the University of North Carolina, Charlotte, in December 2000. The beneficiary listed the following work experience:

| Position | Title | Dates of Employment |
|---|---|---|
| [redacted] | | January 2002 – Present |
| | | April 2001 – October 2001 |
| | | August 1999 – December 2000 (20 hrs. p/wk) |
| | | December 1991 –July 1999 |
| | | February 1982 – November 1991 |
| Sciences | | |

As the record demonstrates that the beneficiary received a Master of Science degree in Computer Science in December 2000, the beneficiary has met the minimum educational requirement listed on the Form ETA 750 as of the priority date.

However, the director found that the employment letters submitted by the petitioner were insufficient to establish that the beneficiary met the work experience requirements or special requirements listed on the Form ETA 750 as of the priority date. Specifically, the director found that the letter from the Institute of Natural Resources and Regional Planning indicated that the beneficiary's primary duty was to perform research in the fields of Land Resources Assessment and Regional planning. The director also found that the letter from the Agro-Environment and Sustainable Development Institute indicates that the beneficiary's primary job duty was to study the impact of global climate change on

Chinese agriculture. The director therefore found that these letters did not establish that the beneficiary had experience in the job offered or in a related position.

On appeal, the counsel has submitted additional letters of experience from the beneficiary's previous employers. Specifically, counsel has submitted the following:

- A letter from [redacted] of the Institute of Natural Resources and Regional Planning, Chinese Academy of Agricultural Sciences (CAAS). The letter states that the beneficiary, in her position as GIS Researcher from February 1982 to November 1991, developed and implemented GIS Applications used in agricultural research, digitized and mapped natural resource maps of China, developed and directed system interface testing procedures, programming and documentation to determine and correct programming errors, and researched, analyzed and rewrote programs to increase operating efficiency. The letter specifies that, even though the beneficiary had the title of "researcher," she did not perform scientific research but instead "researched and developed GIS software used by scientists doing agricultural research."
- A letter from [redacted] of the Agro-Environment and Sustainable Development Institute, CAAS. The letter states that, in her position as a Researcher/Software Developer from December 1991 to July 1999, the beneficiary "designed, developed and implemented complex GIS software to study the impact of global climate change on Chinese agriculture." The letter also states that the beneficiary "used Oracle and Visual Basic to formulate GIS modules." Finally, the letter clarifies that even though the beneficiary had the job title of researcher, she did not perform agricultural research. Instead "[s]he researched and developed GIS software used by agricultural researchers."

The record also contains a letter from [redacted] of Operations with [redacted]. The letter states that the beneficiary worked for [redacted] as a Software Developer from April 9, 2001 to October 19, 2001 and, during that time, she used Visual Basic (6.0), ADO, Active X and Oracle 8.x. The record also contains a letter from [redacted] of computer science at the University of North Carolina, Charlotte. The letter states that, while employed as a Research Assistant/Computer Programmer, the beneficiary used programming tools including Visual Basic 5/6, ADO, ActiveX and Oracle 8.

Based on these letters which corroborate the beneficiary's representations on the Form ETA 750B, this office finds that the petitioner has established that the beneficiary possessed the experience required by the Form ETA 750 as certified by the DOL and submitted with the instant petition. Therefore, the record demonstrates that the beneficiary was qualified to perform the proffered position as of the priority date. This portion of the director's decision is also withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER**: The appeal is sustained. The petition is approved.